

# **INAFSM Position Paper**

## **MAINTAINING, IMPROVING AND ENFORCING THE INDIANA STATE FLOOD CONTROL ACT**

### **INAFSM Position Summary**

INAFSM believes that to continue the current policy of allowing development in the floodway, residential or otherwise, is to allow the lives and property of the citizens of the state of Indiana to be placed in harms way. The trend toward allowing more and more development in the floodway needs to be reversed and measures taken to restore the flood conveyance capacity of affected floodways to safe and satisfactory levels. Any negative economic impact on development in the state will likely be minor and would be more than offset by the decrease in life and property loss from flooding.

### **History of the Indiana State Flood Control Act**

The Indiana State Flood Control Act was enacted on March 7, 1945 in response to growing concern over the loss of life and property due to flooding and the diminishment of the states' water resources. The act established the procedures and regulations intended to preserve and protect the integrity and capacity of the rivers, streams and other natural and present water resources of the state. It also established a commission to oversee and regulate all activities which would impact the natural or present watercourses of the river and streams of Indiana.

One of the primary goals of the act was to prohibit the construction of new abodes (residences) within the regulatory floodway of a river or stream. Residences which existed in the floodway prior to passage of the act were allowed to remain and could in some cases rebuild if proper design and construction procedures were adhered to. Reconstruction for existing residences in the floodway is allowed for situations where the damage is from means other than flooding, such as fire or tornado damage. Residences that were substantially damaged by flooding were not allowed to rebuild. Construction of flood control works and other structures in a floodway was allowed if the appropriate procedures were followed and permits obtained. However, in the years since the passage of the act, new construction has continued to occur within the floodways of Indiana's rivers and streams.

While most all state and local officials were supportive of the objectives of the act, it has been difficult to prevent violations to occur due to the lack of adequate supervision and inspection. Many floodway encroachments occurred due to lack of awareness on the part of the violator, but frequently it was merely a complete disregard of the act. In spite of the best efforts of the Indiana Department of Natural Resources, numerous instances of illegal activity within floodways have occurred on a continuing basis, many involving the construction of residences.

In addition to the illegal construction which continues to occur, efforts were made to amend the act to allow construction of residences in regulatory floodways. Specifically, at least six separate amendments have been made to the act, some of which allow residential construction

within the floodway of the Ohio River. While these amendments contain provisions to ensure that the structures meet certain design and construction criteria, the fact remains that this activity places the lives and property of Indiana citizens unnecessarily in harms' way and likely impacts the integrity of the affected watercourses in a negative manner.

### **Issues and Recommendations**

**Issue No. 1:** The current version of the Act has a number of areas of inconsistency when it comes to what is allowed to occur in the floodway in different areas of the state.

#### Concerns:

- Construction of residences in a floodway is allowed in a few areas but not in most.
- Requirements in the Flood Control Act vary regarding the minimum floor elevation for a structure located in the regulatory floodway.
- Inconsistencies exist for the freeboard requirements for Corps-approved levees when determining the minimum elevations for homes protected by those levees.

#### Recommendations:

- The state needs to “hold the line” and allow no further amendments or policy changes to the act which result in inconsistencies in application of the Act throughout the state.
- Inconsistencies within the Act and between the Act and local ordinances need to be resolved to create uniformity throughout the state.
- The state must not allow regulations, laws or ordinances to be passed which are in direct conflict with the Act.

**Issue No. 2:** The policy for treatment of residences located in a floodway which are damaged by sources other than flooding is not consistent with the intent or spirit of the Act.

#### Concerns:

- The residences are allowed to rebuild in the floodway if they obtain an IDNR Construction in a Floodway permit and elevate to meet the minimum heights requirements.
- Previous amendments to the Act have allowed reconstruction in a floodway to occur.
- Revisions of statewide laws are still occurring which permit damaged residences in a floodway to be restored.

#### Recommendations:

- Development in a floodway is undesirable, whether residential or non-residential.
- The ultimate goal would be to not allow reconstruction of damaged residences in a floodway regardless of the source of damage.
- The ability of the state to ensure the safety of the general public should not be compromised for political or economic reasons.

**Issue No. 3:** Amendments to the Act presently allow construction of residences on the Ohio River.

Concerns:

- The amendments were enacted by political means for economic benefit or to alleviate public pressure for a timely resolution to the dislocation of residents.
- The allowance of residences in a floodway in some areas is encouraging other areas of the state to seriously consider allowing residential construction in floodways.

Recommendations:

- The amendments allowing residential construction in floodways must be rescinded and future amendments must be denied.
- Information on fatalities and property losses from previous flooding should be researched and documented to support efforts to reverse the current trends. INAFSM would be willing to do the research necessary to compile this information with the resources they have available.

**Issue No. 4:** The process for providing assistance or to buyout residences located in a floodway which have suffered substantial damage.

Concerns:

- The structure cannot be legally reconstructed “as is”.
- There are inadequate Federal funds currently available to “buyout” all damaged structures/residences which would qualify in a reasonable time frame.
- There are a number of communities without a program or procedures in place to instigate a buyout plan.
- There is no state mechanism in place to assist or supplement a Federal buyout or to implement a state-funded buyout.

Recommendations:

- The state should establish a hazard mitigation fund to supplement available Federal funding for buyouts. This needs to be done concurrently with creating a program to provide a quicker response in the aftermath of any disaster.
- Local communities need to be encouraged and assisted to provide incentives for not rebuilding residences in floodways. Local tax breaks may be one option available.
- The state and local communities should encourage recreational usage of floodway areas which exclude the use of permanent structures.

**Issue No. 5:** The current state procedures for evaluating the impact of new construction in a floodway considers the cumulative effect of all past construction as well, permitted and unpermitted. This was previously not the case. The previous policy only required that the proposed activity be evaluated to ensure that it did not cause a surcharge in excess of 0.14 foot by itself. However, neither the new nor old policies have adequately considered “reasonably foreseeable future actions” as required in 312 IAC 10-2-18. Such “reasonably foreseeable

future actions” should include the assumption that all flood fringe areas along the stream reach being studied will be filled (as allowed by the State without requiring a permit).

Concerns:

- Current procedures do not consider “reasonably foreseeable future actions” and therefore neglect the impact of total build-out of flood fringe areas. This would lead to flood elevation surcharges that are greater than 0.14 feet, undermining the intent of allowing only a negligible cumulative impact as a result of a new project.

Recommendations:

- Total build-out conditions in the floodway fringe should be accounted for in the hydraulic modeling when evaluating the impact of proposed new construction in a floodway.

**Issue No. 6:** The allowance of commercial development in floodways by current state statutes has created more potential for increased losses.

Concerns:

- Commercial development in the floodway is more susceptible to economic losses due to flooding despite requirements for elevating the property. The potential for loss of life is also present, however small the risk may be.

Recommendations:

- The state law should be amended to prohibit the presence of any “insurable” structure in a floodway.

**Issue No. 7:** The enforcement of the existing laws is not occurring, leading to increased losses and liability.

Concerns:

- Most state regulatory agencies are not fully staffed, leading to the inability to provide adequate enforcement of existing laws.

Recommendations:

- The state government must make a commitment to provide a more stringent level of enforcement to prevent further un-permitted activity to occur.
- Regulatory agencies must be given the means to pursue and prosecute violators to prevent and discourage future abuse of the existing laws.